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April 29, 2013

VIA Electronic and U.S. Mail

Robert Foley, Chair
c/o Cynthia Bertocci, Executive Analyst
Maine Board of Environmental Protection
17 State House Station
Augusta, Maine 04333-0017

**Re: Process for Consideration on Remand
Saddleback Ridge Wind, LLC
L-25137-24-A-N/L-25137-TG-B-N (approval)**

Dear Chair Foley and Members of the Board,

I am writing on behalf of Saddleback Ridge Wind, LLC ("SRW"), to respond to the legal argument contained in appellants' April 29, 2013 letter to the Board. For the reasons discussed below, the Maine Supreme Court's remand of SRW's license should be heard and decided by the Board rather than the Commissioner.

First, the Court's ruling vacated the "Board's order" and remanded for further review. Friends of Maine's Mountains, 2013 ME 25 ¶¶ 2, 17. The Court did not vacate the Commissioner's underlying license, which is still subject to the appeal now pending before the Board on remand. The current procedural posture of the case is the resumption of the Board's appellate review of the staff license based on the Court's remand instructions with respect to the appropriate regulatory framework for the Board to apply on appeal.

Second, only the Board has the legal authority to do what the Court has required on remand. The Court ruled that the Board abused its discretion by not requiring SRW to comply with the provisionally-adopted 42 dBA nighttime limit as opposed to the legally applicable 45 dBA nighttime limit. Friends of Maine's Mountains, 2013 ME 25 ¶ 17. In other words, the Court's remand requires departure from the applicable numerical sound limits contained in Chapter 375(10). Under Department rules, the Commissioner's staff does not have legal authority to take that action. Only the Board has that authority.

Chapter 375 states that "The Board may, as a term or condition of approval, establish any reasonable requirement to ensure that the developer has made adequate provision for the control of noise and to reduce the impact of noise on protected locations." 06-096 CMR 375(10)(E) (emphasis added). This provision is the basis for the Court's holding that the Board has

discretion to diverge from the legally applicable numerical sound limits contained in the Chapter 375 noise rules. Friends of Maine's Mountains, 2013 ME 25 ¶ 12. The Court noted that the DEP noise rules specifically vest that authority with the Board as opposed to the Commissioner. Id. (stating that “the Board’s rules provide it with the flexibility necessary to impose limits on proposed wind projects so that sound levels are adequately controlled” and “noting that the Board may alter sound level limits”).

The terms “Board” and “Commissioner” are statutorily defined and are mutually exclusive. 38 M.R.S.A. § 341-A(2) (“The department shall consist of the Board of Environmental Protection, in the laws administered by the department called “board,” and of a Commissioner of Environmental Protection, in the laws administered by the department called “commissioner.”).

The fact that Section 10(E) of Chapter 375 vests such authority with the Board makes sense because it was the Board that promulgated the rules in the first instance. Departure from the numerical sound limits should only be done by the body that established those sound limits and understood the basis for them.

Finally, the argument advanced by the appellants’ April 29, 2013 letter (i.e. that Board’s jurisdiction is solely appellate with respect to expedited wind power projects) was recently addressed and rejected by the Maine Supreme Court. See Concerned Citizens to Save Roxbury v. Board of Environmental Protection, 2011 ME 39, ¶¶ 12-17, 15 A.3d 1263, 1268-69. Concerned Citizens was an appeal of the Board’s affirmance of a DEP license to construct the Record Hill wind power project. The Concerned Citizens Court held that, despite the statutory prohibition on the Board assuming original jurisdiction over expedited wind energy projects, the Board’s rules gave it authority to reach its own findings of fact and conclusions of law, even in the case of wind power projects. Id. ¶ 16. In Concerned Citizens, which was governed by the same legal framework at issue here, the Court held:

The Board engaged in an independent review of the record in this case. The record considered by the Board included not only the administrative record before the Commissioner, but also the supplemental evidence presented by the parties. Based on its independent review, the Board made specific findings of fact with respect to whether Record Hill met applicable licensing requirements. Because the Board acted as a fact-finder and reviewed the substantive issues de novo, we conclude it is the Board’s decision that we review on appeal.

Id. ¶ 17.

Furthermore, the appellants’ claim that SRW’s submission before the Board constitutes an “amendment” and therefore must be reviewed by the commissioner is misplaced. SRW is acting in response to a change in law mandated by the Court’s remand order. SRW’s submission is before the Board in the context of an ongoing appeal, not in the context of a change to the project initiated by SRW. Even if SRW’s submission were an amendment, that would not strip

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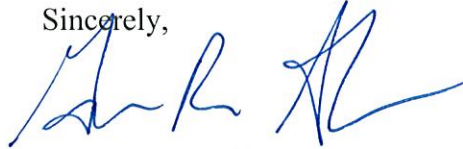
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the Board of jurisdiction. Appellants claim incorrectly that because an amendment is “subject to a decision by the department,” 38 M.R.S.A. § 344(9) (emphasis added), only the commissioner can act on SRW’s submission. However, this argument ignores the fact that, as noted above, the term “department” encompasses both the commissioner and the board. 38 M.R.S.A. § 341-A(2).

Accordingly, contrary to the appellants’ contention, it is well-settled law that the Board has jurisdiction and is the appropriate body to review and rule on SRW’s submission on remand.

Thank you for your attention to this matter.

Sincerely,



Gordon R. Smith

cc: Commissioner Patricia Aho
Assistant Attorney General Peggy Bensinger
Mark Bergeron
Erle Townsend
Rufus Brown, Esq.